NO. 79977-6

SUPREME COURT OF THE STATE OF WASHINGTON

INDOOR BILLBOARD/WASHINGTON, INC., a Washington corporation, individually and on behalf of a class of persons and/or entities similarly situated,

Appellant/Cross-Respondent,

v.

INTEGRA TELECOM OF WASHINGTON, INC., a Washington corporation,

Respondent/Cross-Appellant.

BRIEF OF APPELLANT/CROSS-RESPONDENT IN ANSWER TO BRIEFS OF AMICI CURIAE

J. David Stahl
MUNDT MACGREGOR L.L.P.
999 Third Avenue, Suite 4200
Seattle, Washington 98104-4082
(206) 624-5950

Attorneys for Appellant/Cross-Respondent, Indoor Billboard/Washington, Inc.

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Pursuant to RAP 10.2(g), Appellant/Cross-Respondent, Indoor Billboard/Washington, Inc. ("Indoor Billboard"), submits this brief in answer to the briefs of *amici curiae,* the Attorney General of Washington and the Washington State Trial Lawyers Association Foundation.

I. ARGUMENT IN ANSWER TO AMICI CURIAE

A. This Court's Pre-*Hangman Ridge* Jurisprudence Did Not Require Proof of Individual Reliance as an Element of a Private CPA Claim.

This Court explicitly adopted a "causal link" element for private CPA damages actions for the first time in Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 793, 544 P.2d 531 (1986). In so doing, the Court noted that this causation element had been "foreshadowed" by its previous opinions and that the "inducement" prong of the now-discarded "inducement-damages-repetition" test for public interest impact under Anhold v. Daniels[1] "hints at a causation requirement." 105 Wn.2d at 793.

Significantly, prior to its Hangman Ridge decision, this Court had held in Eastlake Construction Co. v. Hess, 102 Wn.2d 30, 51, 686 P.2d 465 (1984), that the "inducement" prong of the old Anhold public interest test did not require proof of individual inducement of, or reliance by, the plaintiff. Rather, in Eastlake, the Court held that the inducement prong

[1] Anhold v. Daniels, 94 Wn.2d 40, 46, 614 P.2d 184 (1980).

could be satisfied by evidence that the defendant's unfair or deceptive acts or practices were of a type that "serve to induce potential purchasers" and that the plaintiff was a purchaser. Id. ("As [Eastlake's] conduct serves to induce potential purchasers, and as Eastlake appears to have engaged in such conduct, we find that Hess has made the requisite showing of inducement under Anhold v. Daniels."). On this basis, the Court reversed the trial court's dismissal of Hess' CPA claim, which had been based on the lack of evidence that Eastlake's unfair or deceptive acts and practices had induced Hess to enter into the specific contract at issue. Id.

In reaching this result, this Court observed that if a more stringent standard of individual inducement (reliance) were required, many unfair or deceptive trade practices would fall beyond the reach of the CPA, contrary to the Legislature's purpose of protecting the public from such practices:

> A contrary conclusion would exclude from the operation of the act conduct which clearly should be subject to the express legislative purpose of protecting the public from unfair, deceptive and fraudulent acts or practices. RCW 19.86.920. In particular, the act is designed to protect the public from those who would repeatedly indulge in unfair or deceptive practices, as Hess claims Eastlake has done. In order that this purpose be served, the act is to be construed liberally. RCW 19.86.920. Courts should not readily find an absence of inducement to act in cases where evidence is presented of a pattern of deceptive practices.

Eastlake, 102 Wn.2d at 52 (emphasis supplied).

To the extent the Court of Appeals in Nuttall v. Dowell[2] interpreted the "inducement" prong of the old Anhold public interest test as requiring proof of individual inducement of (reliance by) a private CPA plaintiff, see 31 Wn. App. at 111, that interpretation was explicitly rejected two years later by this Court's decision in Eastlake.[3] 102 Wn.2d at 51. This Court implicitly recognized as much when it failed to require either "inducement" or "reliance" as the standard for meeting the "causal link" element of a private CPA claim established in Hangman Ridge. 105 Wn.2d at 793.

B. Analogous Federal Law Does Not Require Proof of Individual Reliance.

In adopting the CPA, the Washington Legislature expressly stated its intent that "in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters" and that the CPA be "liberally construed that its

[2] Nuttall v. Dowell, 31 Wn. App. 98, 639 P.2d 832 (1982).

[3] In Nuttall, the misrepresentation giving rise to the CPA claim was made in the course of a private real estate transaction, 31 Wn. App. at 110-12, and there was no evidence the defendant had made similar misrepresentations likely to induce other potential purchasers, as there was in Eastlake. 102 Wn.2d. at 51. In the present case, Integra's unfair and deceptive misrepresentation of the nature of its surcharge as a "PICC" was disseminated to all of its local exchange service customers here in Washington, numbering in the thousands. (CP 369-72).

beneficial purposes may be served." RCW 19.86.920. The most analogous federal law is the Federal Trade Commission Act ("FTCA"), which like the CPA authorizes recovery of damages on behalf of consumers victimized by unfair or deceptive trade practices. See 15 U.S.C. § 57(b). Like the CPA, Section 19(b) of the FTCA requires a causal link between the defendant's unfair or deceptive practice and the consumer's injury. Id. (FTC may recover damages to redress consumer injuries "resulting from" deceptive acts or practices); compare RCW 19.86.090 (authorizing private damages recovery under the CPA for consumers "injured by" an unfair or deceptive practice).

The federal courts have held that proof of individual reliance is not required to establish causation under Section 19(b) of the FTCA. F.T.C. v. Figgie Int'l., 994 F.2d 595, 605 (9th Cir. 1993) (presumption of reliance arises upon proof that a defendant "made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product."). Contrasting the reliance requirement in common law fraud, the Ninth Circuit in Figgie noted Sections 13 and 19(b) of the FTCA

> serve[] a public purpose by authorizing the Commission to seek redress on behalf of injured consumers. Requiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer

> redress actions and frustrate the statutory goals of the [FTCA]."

994 F.2d at 605.

The federal court's approach to causation under Section 19(b) of the FTCA in Figgie is strikingly similar to this Court's pre-Hangman Ridge analysis of the "inducement" prong of the old public interest impact test in Eastlake, 102 Wn.2d at 51, and should be followed here as the Legislature has directed. RCW 19.86.920. To do otherwise, and impose a stringent individual reliance requirement on private CPA claimants, would be inconsistent with the Legislature's intent that the Act be "liberally construed that its beneficial purposes may be served." Id. As the Minnesota Supreme Court noted in rejecting a strict reliance requirement for private claims under that state's act,

> [t]o impose a requirement of proof of individual reliance in the guise of causation would reinstate the strict common law reliance standard that we have concluded the legislature meant to lower for these statutory actions. Moreover, we are confident that the legislature would not have authorized private damages actions such as this, where the alleged misrepresentations are claimed to have affected a large number of consumers, while retaining a strict burden of proof that depends on evidence of individual consumer reliance.

Group Health Plan, Inc. v. Philip Morris Inc., 621 N.W. 2d 2, 15 (Minn. 2001). The same is true here.

C. The Voluntary Payment Doctrine is a Common Law Defense That Should Have No Applicability to CPA Claims.

Because the CPA was intended to expand and liberalize common law rules, which often left consumers without a remedy, this Court should hold that the voluntary payment doctrine is unavailable as a defense to a private CPA claim. See Speckert v. Bunker Hill Arizona Mining Co., 6 Wn.2d 39, 52, 106 P.2d 602 (1940) (payment is "voluntary" if illegal demand is paid with full knowledge of all the facts which render the demand illegal). As argued in Indoor Billboard's opening brief, see Brief of Appellant at 47-48, the evidence of record in the present case falls far short of establishing that Indoor Billboard had "full knowledge" of the true nature of Integra's "PICC" surcharge when it remitted payment of that surcharge. However, this case presents an opportunity for the Court to clearly hold that the voluntary payment defense is entirely inapplicable to private CPA claims.

To deny consumers a CPA remedy because they may have paid a bill after learning of the defendant's unfair or deceptive practices would ignore the disparity of bargaining power between consumers and businesses that CPA statutes were designed, in part, to address. Consumers are often rightly fearful of the consequences of unilateral nonpayment. Indeed, the evidence in the present case is that, notwithstanding his continuing concerns about the appropriateness of Integra's "PICC" surcharge, Indoor Billboard's vice-president, James Shulevitz, remitted payment of the surcharge because he wasn't certain it was <u>not</u> an appropriate PICC charge and he was concerned about the consequences of disputing a charge at the outset of a two-year contractual relationship with Integra. (CP 147; CP 226). Payment of Integra's unfairly and deceptively mislabeled "PICC" surcharge under such circumstances should not preclude the availability of a remedy under the CPA.

II. CONCLUSION

For the foregoing reasons, the Court should hold that proof of reliance is not required to establish the "causal link" between Integra's unfair and deceptive denomination of its surcharge as a "PICC" and Indoor Billboard's remittance of payment to Integra for a "PICC" surcharge that was not, in fact, a PICC. The Court should also hold that the voluntary payment doctrine is not available as a defense to a private claim for damages under the CPA.

RESPECTFULLY SUBMITTED this 18th day of May, 2007.

MUNDT MacGREGOR L.L.P.

By ______________________
J. David Stahl
WSB No. 14113

Attorneys for Appellant/Cross-Respondent, Indoor Billboard/Washington, Inc.

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